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Leong Pik Yien v Edwin ak Mula & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL LEAVE APPLICATION
NO Q-08–124–05 OF 2023
RAVINTHRAN, CHE MOHD RUZIMA AND AZMI ARIFFIN JJCA
26 MARCH 2024

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Civil Procedure — Appeal — Application for leave to appeal — Plaintiff's vehicle seized by customs officers — Plaintiff's request for release of vehicle unsuccessful — Plaintiff filed application in High Court to claim for release of vehicle — High Court judge dismissed plaintiff's claim — Plaintiff filed application for leave to appeal against High Court's decision — Whether plaintiff did or did not make claim under s 128(1)(b) read together with s 128(3) of the Customs Act 1967 before expiry of one calendar month from date of seizure of vehicle — Whether plaintiff could demonstrate prima facie case of error — Whether application for leave to appeal should be allowed — Courts of Judicature Act 1964 s 68 — Customs Act 1967 ss 114, 128(1)(b), (3) & 135(1)(d)

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The plaintiff was the owner of a Brunei registered vehicle bearing registration number BAK 7229 ('the vehicle'). The vehicle was seized by a team of customs enforcement officers headed by the first defendant under s 114 of the Customs Act 1967 ('the Act') with a reasonable cause to suspect that the plaintiff had committed an offence under s 135(1)(d) of the Act. The plaintiff's multiple application to the defendants for the release of the vehicle was unsuccessful, hence, the plaintiff filed originating summons in the Miri High Court to claim for the release of the vehicle. At the end of the case, the High Court dismissed the plaintiff's application. Dissatisfied with the decision, the plaintiff filed the present notice of motion for leave to appeal against the whole decision of the High Court ('encl 1'). The plaintiff argued that: (a) the learned High Court judge ('the HCJ') had erred in law and/or in fact by relying on the bare denials of the first defendant; and (b) the learned HCJ failed to appreciate that the WhatsApp messages between the plaintiff's mother and the custom officer ('the said screenshot of WhatsApp conversation') shall suffice as a written notice under s 128(1) of the Act. The defendants on the other hand argued that there was no evidence adduced to prove that the plaintiff had indeed made a claim in writing to the seized vehicle within the one-month period stipulated. In this regard, even though the plaintiff claimed that she had issued the written notice to claim the said vehicle via letter dated 5 March 2020, documentary evidence adduced by the plaintiff in exh L3 clearly showed that the said letter was served on 15 September 2022. The issue to be determined in the present case was whether the plaintiff (who claimed to be the owner of the vehicle) did, or did

not make a claim under s 128(1)(b) read together with s 128(3) of the Act before the expiry of one calendar month from the date of seizure.

Held, allowing encl 1, ordering that the plaintiff be given 30 days from the date of leave being granted to file the notice of appeal and ordering that the costs of the application be costs in the cause:

- (1) The plaintiff's affidavit in reply dated 14 December 2021 stated that on 24 February 2020, she and her mother met the customs officer namely, Mohd Alamin bin Mohamed ('the said customs officer') at the Customs Office at Miri in relation to the seizure of the said vehicle. The plaintiff had also personally delivered a written application dated 5 March 2020 to the Customs Office at Miri within a month from the date of the seizure i.e. on 6 February 2020. These material sworn statements in the plaintiff's affidavits were crucial to show that a written application was indeed made within the stipulated time period and those statements were never disputed by the said customs officer in any affidavits. The bare denials of the first defendant in respect of the plaintiff's written application and visits to the Customs Office at Miri must certainly be ignored as the first defendant had no personal knowledge of the matters therein. Further, the court found that the said screenshot of WhatsApp conversation was reliable, and this evidence further strengthened the existence of a valid written claim for the temporary release of the said vehicle been made by the plaintiff within the time limit in pursuant to s 128(1) of the Customs Act 1967 (see paras 33, 36 & 42).
- (2) In all these circumstances, it was evident that there was sufficient notice of claim as envisaged under s 128(1)(b) and 128(3) of the Act before the expiry of one calendar month from the date of seizure. The learned trial judge had fallen into error in his findings by attaching undue weight on the defendants' denials of the delivery of exh L- 3 in March 2020 and by heavily relying on the acknowledged receipt dated 15 September 2020 without giving due appreciation to the overwhelming documentary evidence led by the plaintiff, warranting appellate intervention (see paras 47 & 48).

[Bahasa Malaysia summary]

Plaintif adalah pemilik kenderaan berdaftar Brunei yang mempunyai nombor pendaftaran BAK 7229 ('kenderaan tersebut'). Kenderaan tersebut telah disita oleh sepasukan pegawai penguat kuasa kastam yang diketuai oleh defendan pertama di bawah s 114 Akta Kastam 1967 ('Akta tersebut') dengan alasan munasabah untuk mengesyaki bahawa plaintiff telah melakukan kesalahan di bawah s 135(1)(d) Akta tersebut. Permohonan-permohonan plaintiff kepada defendan-defendan untuk pelepasan kenderaan tersebut tidak berjaya, justeru, plaintiff memfailkan saman pemula di Mahkamah Tinggi Miri untuk menuntut pelepasan kenderaan tersebut. Pada akhir kes, Mahkamah Tinggi

- A menolak permohonan plaintif. Tidak berpuas hati dengan keputusan tersebut, plaintif memfailkan notis usul semasa untuk memohon kebenaran merayu terhadap keseluruhan keputusan Mahkamah Tinggi ('lampiran 1'). Plaintif berhujah bahawa: (a) hakim Mahkamah Tinggi yang bijaksana ('HMT') telah terkhilaf dari segi undang-undang dan/atau fakta dengan bergantung kepada
- B penafian kosong defendan pertama; dan (b) HMT yang bijaksana gagal menghargai bahawa mesej WhatsApp antara ibu plaintif dan pegawai kastam ('tangapan skrin perbualan WhatsApp tersebut') adalah memadai sebagai notis bertulis di bawah s 128(1) Akta tersebut. Defendan-defendan sebaliknya
- C berhujah bahawa tiada keterangan dikemukakan untuk membuktikan bahawa plaintif sememangnya telah membuat tuntutan secara bertulis ke atas kenderaan yang disita tersebut dalam tempoh sebulan yang ditetapkan. Berhubung dengan ini, walaupun plaintif mendakwa bahawa dia telah mengeluarkan notis bertulis untuk menuntut kenderaan tersebut melalui surat
- D bertarikh 5 Mac 2020, keterangan dokumentar yang dikemukakan oleh plaintif dalam eksh L3 jelas menunjukkan bahawa surat tersebut telah diserahkan pada 15 September 2022. Isu yang perlu diputuskan dalam kes ini ialah sama ada plaintif (yang mendakwa sebagai pemilik kenderaan tersebut) telah membuat, atau tidak membuat tuntutan di bawah s 128(1)(b) dibaca
- E bersama s 128(3) Akta tersebut sebelum tamat tempoh satu bulan kalendar dari tarikh penyitaan.

Diputuskan, membenarkan lampiran 1, memerintahkan supaya plaintif diberi 30 hari dari tarikh kebenaran diberikan untuk memfailkan notis rayuan dan memerintahkan bahawa kos permohonan adalah kos dalam kausa:

- (1) Affidavit jawapan plaintif bertarikh 14 Disember 2021 menyatakan bahawa pada 24 Februari 2020, beliau dan ibunya telah berjumpa dengan pegawai kastam iaitu Mohd Alamin bin Mohamed ('pegawai kastam tersebut') di Pejabat Kastam di Miri berhubung dengan
- G penyitaan kenderaan tersebut. Plaintif juga telah menghantar sendiri permohonan bertulis bertarikh 5 Mac 2020 kepada Pejabat Kastam di Miri dalam tempoh sebulan dari tarikh penyitaan iaitu pada 6 Februari 2020. Penyataan bersumpah material dalam affidavit plaintif ini adalah
- H penting untuk menunjukkan bahawa permohonan bertulis sememangnya telah dibuat dalam tempoh masa yang ditetapkan dan penyataan tersebut tidak pernah dipertikaikan oleh pegawai kastam tersebut dalam mana-mana affidavit. Penafian kosong defendan pertama berkenaan dengan permohonan bertulis plaintif dan lawatan ke Pejabat
- I Kastam di Miri pastinya perlu diabaikan kerana defendan pertama tidak mempunyai pengetahuan peribadi tentang perkara-perkara mengenainya. Selanjutnya, mahkamah mendapati tangkapan skrin perbualan WhatsApp tersebut boleh dipercayai, dan keterangan ini mengukuhkan lagi kewujudan tuntutan bertulis yang sah untuk

pelepasan sementara kenderaan tersebut yang telah dibuat oleh plaintif dalam tempoh had masa menurut s 128(1) Akta Kastam 1967 (lihat perenggan 33, 36 & 42).

- (2) Dalam semua keadaan ini, adalah jelas bahawa terdapat notis tuntutan yang mencukupi seperti yang dikehendaki di bawah s 128(1)(b) dan 128(3) Akta tersebut sebelum tamat tempoh satu bulan kalendar dari tarikh penyitaan. Hakim perbicaraan yang bijaksana telah terkhilaf dalam dapatannya apabila meletakkan nilai yang tidak wajar pada penafian defendan-defendan terhadap serahan eksh L- 3 pada Mac 2020 dan apabila terlalu bergantung pada penerimaan yang diakui bertarikh 15 September 2020 tanpa memberikan penghargaan yang sewajarnya kepada keterangan dokumentar yang banyak oleh plaintif, yang mewajarkan campur tangan rayuan (lihat perenggan 47 & 48).]

Cases referred to

Assan bin Mohamad & Ors v Hock Huat Chan Sdn Bhd [2013] 5 MLJ 76, CA (refd)

Country Garden Danga Bay Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor [2019] MLJU 1295; [2020] 4 CLJ 865, CA (refd)

Hock Huat Chan Sdn Bhd v Assan bin Mohammad & Ors [2008] MLJU 92; [2008] 4 CLJ 512, HC (refd)

Hong Leong Finance Bhd v Low Thiam Hoe & another appeal [2016] 1 MLJ 301; [2016] 3 MLRA 81, FC (refd)

Jabatan Kastam Diraja Malaysia & Ors v Apple International Co Ltd (Japan) [2017] 3 MLJ 421, CA (refd)

Mehdi Dadashi Havadaragh v Ketua Pengarah Jabatan Kastam Diraja Malaysia & Ors [2015] 4 MLJ 646; [2016] 3 MLRA 657, CA (refd)

Pang Hon Chin v Nahar Singh [1986] 2 MLJ 145 (refd)

United Oriental Assurance Sdn Bhd v Penang Medical Centre Sdn Bhd [1999] 2 MLJ 542, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 68, 68(1)

Customs Act 1967 ss 114, 115, 116(5), 128, 128 (1), (1)(b), (2), (3), 135(1)(d)

Customs Duties (Exemption) Order 2017 Schedule 1, Item 13

Appeal from: Originating Summons No MYJ-24-15/10 of 2021 (High Court, Miri)

Tan Joon Ian (Yong Wong & Chin Advocates) for the appellant.

Ronie ak Entili (Deputy Public Prosecutor, Attorney General's Chambers) for the respondents.

A Azmi Ariffin JCA:

INTRODUCTION

B [1] Enclosure 1 dated 16 May 2023 is the applicant notice of motion for leave to appeal against the whole decision of the Miri High Court given on the 17 April 2023 which had dismissed the applicant claim for the release of a Black BMW X3 bearing Brunei Registration No BAK 7228 under Originating Summons Application No MYY-24-151/0 of 2021 (HC) (encl 1) dated 20 October 2021 with no order as to costs.

C [2] For ease of reference, the applicant shall be hereinafter referred to as the plaintiff and the respondents as the defendant in this judgment.

BACKGROUND FACTS

D [3] It is pertinent to recap the sequence of events and facts in order to appreciate the factual matrix of the present appeal.

E [4] The plaintiff is the registered owner of one unit of vehicle registered in Brunei Darussalam bearing Registration No BAK 7228.

[5] The plaintiff had been granted with the temporary import permit ('VMS') for the said vehicle which expired on 3 November 2019.

F [6] On 6 February 2020, a team of Customs Enforcement Officers headed by first defendant (Edwin ak Mula) was on patrolling duty along Jalan Dato Permaisuri, 98000 Miri.

G [7] At about 11.30am, they saw a Brunei registered vehicle bearing registration number BAK 7229 were parked in front of the premise of Lao Yang Dim Sum. Later, plaintiff was seen walking toward the said vehicle and the first defendant and his team decided to approach her and introduce themselves as Customs Enforcement Officer.

H [8] Upon inspection, the first defendant and his team found out that the temporary import permit for the said vehicle had expired on 3 November 2019. Thus, plaintiff had failed to comply with the terms and conditions of item 13, Schedule 1 of the Customs Duties (Exemption) Order 2017.

I Accordingly, the first defendant informed the plaintiff to drive the said vehicle to their office for further inspection and explanation.

[9] The plaintiff therefore drove the said vehicle to the first defendant's office escorted by his team. At the first defendant's office, the plaintiff had

surrendered the said vehicle together with the said vehicle's key and a photocopy of the registration card to the first defendant. Accordingly, a seizure notice (*notis sitaan*) made under s 114 of the Customs Act 1967 was issued to the plaintiff on the same day.

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[10] The plaintiff remained at the first defendant's office and later was released on bond of RM500 pursuant to s 116(5) of the Customs Act.

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[11] The plaintiff had written a letter dated 5 March 2020, to the first defendant's office 'Notice to Claim & Application for Temporary Release of Seized Vehicle BAK 7228'. Despite dated as 5 March 2020, the defendants claimed that the said letter was only served on the first defendant's office on 15 September 2020 which is seven months after the seizure notice was issued to the plaintiff.

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[12] The plaintiff also issued another letter dated 11 September 2020. Despite dated as 11 September 2020, the said letter was only served on the first defendant's office on 15 September 2020 which is seven months after the seizure notice was issued to the plaintiff.

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[13] The said vehicle was seized under s 114 of the Customs Act with a reasonable cause to suspect that the plaintiff had committed an offence under s 135(1)(d) of the Customs Act 1967.

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[14] On 24 February 2020, the plaintiff said that she was interviewed by the Customs Officer WK41, Mohd Alamin bin Mohamed at the Customs Office, Miri and the plaintiff had also expressed her intention to claim for the release of the said vehicle to both Customs Officers namely Mohd Alamin bin Mohamed while meeting him on several occasions at Miri Customs Office and one other officer called Sue by WhatsApp messages communications on 24 February 2020 and 6 March 2020 via plaintiff's mother, Kho Yam Chue's handphone.

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[15] Plaintiff's claimed that even though she was not legally represented at that material time, yet she had fully complied with s 128(1)(b) of the Act and cl (4) of the above said seizure notice by personally issuing a written notice seeking for the release of the said vehicle by her letter 'Notice to Claim & Application for Temporary Release of Seized Vehicle (Brunei Registration No BAK7228)' dated 5 March 2020 to the first defendant. However, the plaintiff said that she was told by Mohd Alamin bin Mohamed that the 'one-month notice' was a mere requirement on paper and the defendants could not proceed with the plaintiff's written application while they are waiting for the letter from the court and Brunei Consulate.

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A [16] Due to a lack of response from the defendants, a further a written application made by the plaintiff's brother Leong Yit Mann was sent to the State Director of Royal Malaysia Customs namely Dato' Hajah Sharifah Halim bt Tuanku Taha and the first defendant on 11 September 2020. However, the defendants had failed and/or refused and/or neglected to release the said vehicle. Neither did the defendants refer the plaintiff's claim to the magistrate's court.

C [17] The plaintiff then, through her solicitor, issued a letter of demand on 29 September 2021 to the Customs Department, Enforcement Division, Miri for the release of the said vehicle due to unlawful retention. Despite repeated demands and/or requests from the plaintiff, the said vehicle remains under the detention of the defendants without any probable cause or justification till date.

D HIGH COURT'S FINDING

E [18] At the High Court, the learned judge dismissed the plaintiff's claim with no order as to costs. However, he had not provided written grounds for his judgment.

The relevant provisions of law:

(a) s 68 Courts of Judicature Act 1964 which reads:

Non-appealable matters

F (1) No appeals shall be brought to the Court of Appeal in any of the following cases:

G *(a) when the amount or value of the subject-matter of the claim (exclusive of interest) is less than two hundred and fifty thousand ringgit, except with the leave of the Court of Appeal;*

(b) where the judgment or order is made by consent of parties;

(c) where the judgment or order relates to costs only which by law are left to the discretion of the Court, except with the leave of the Court of Appeal; and

H (d) where, by any written law for the time being in force, the judgment or order of the High Court, is expressly declared to be final.

(b) s 114 of the Customs Act 1967 which reads:

114 Seizure of goods the subject of an offence

I (1) All goods in respect of which there has been, or there is, reasonable cause to suspect that there has been committed any offence against this Act or any regulation made thereunder, or any breach of any of the provisions of this Act or of any regulation made thereunder or of any restriction or condition subject to or upon which any licence or permit

- has been granted, together with any receptacle, package, conveyance other than vessel exceeding two hundred tons nett registered tonnage or aircraft engaged in international carriage, in which the same may have been found or which has been used in connection with such offence or breach, and any books or documents which may reasonably be believed to have a bearing on the case, may be seized by any officer of customs on the person or in any place either on land or in territorial waters. A
- (2) ... B
- (3) Whenever any goods and such receptacles, packages or conveyances referred to in subsection (1) are seized under this Act, the seizing officer shall forthwith give notice in writing of such seizure and the grounds thereof to the owner of such goods, if known, either by delivering such notice to him personally or by post at the person's last known address. C
- (c) s 115 of the Customs Act 1967 which reads: D
- (1) Where any goods have been seized under this Act, a senior officer of customs may, at his discretion —
- (a) temporarily return the goods to the owner thereof or to the person from whose possession, custody or control the goods were seized, or to such person as a senior officer of customs may consider entitled thereto, subject to such terms and conditions as a senior officer of customs may impose, and, subject, in any case, to sufficient security being furnished to the satisfaction of a senior officer of customs that the goods shall be surrendered to a senior officer of customs on demand being made by a senior officer of customs and that the said terms and conditions, if any, shall be complied with; or E
- (b) return the goods to the owner thereof or to the person from whose possession, custody or control the goods were seized, or to such person as a senior officer of customs may consider entitled thereto, with liberty for the person to whom the goods are so returned to dispose of the same, such return being subject to such terms and conditions as a senior officer of customs may impose and security being furnished to the satisfaction of a senior officer of customs in an amount not less than an amount which, in the opinion of a senior officer of customs, represents — F
- (i) for goods other than dutiable or un customed goods, its open market value, and for dutiable or un customed goods, their value, on the date on which such goods are so returned; G
- (ii) the customs duty payable in respect thereof, if any; and H
- (iii) any tax payable in respect thereof under any written law, if any, for the payment of the amount so secured to the Director General in the event of the court making an order for the forfeiture of such amount under subsection 127(1A) or 128(4), or in the event of such amount being forfeited under section 131, as the case may be; or I
- (d) s 128 of the Customs Act 1967 provides as follows:

- A** 128 Goods seized in respect of which there is no prosecution, or the proceeds of sale thereof, are forfeited if not claimed within one month.
- B** (1) If there be no prosecution with regard to any goods seized under this Act, such goods or the proceeds of sale of such goods which are held pursuant to paragraph (c) of subsection (1) of section 115 shall be taken and deemed to be forfeited at the expiration of one calendar month from the date of seizure of the goods unless, before such expiration.
- (a) a claim to such goods or the proceeds of sale of such goods is made under subsection (2);
- C** (b) *a written application is made for the return of such goods under paragraph (a) or (b) of subsection (1) of section 115; or*
- (c) such goods are returned under the said paragraph (a) or (b).
- D** (2) Any person asserting that he is the owner of such goods or the proceeds of sale of such goods, as the case may be, and that they are not liable to forfeiture may give written notice to a senior officer of customs that he claims the same.
- E** (3) *On the expiration of the period mentioned in subsection (1), or, if a decision is made earlier that there be no prosecution with regard to the goods, on the making of the decision the senior officer of customs shall, if such goods or the proceeds of sale of such goods are not taken and deemed to be forfeited under that subsection, refer the claim to the Director General.*
- (3A) *Upon reference by the senior officer of customs under subsection (3), the Director General may direct such senior officer of customs —*
- F** (a) *to release such goods or the proceeds of sale of such goods or the security furnished under paragraph 115(1)(a) or (b); or*
- (b) *by information in the prescribed form, to refer the matter to a Magistrate of the First Class for his decision.*
- G** (4) *The Magistrate of the First Class shall issue a summons requiring the person asserting that he is the owner of the goods or the proceeds of sale of such goods, and the person from whom the goods were seized, to appear before him, and upon their appearance or default to appear, due service of such summons being proved, the Magistrate of the First Class shall proceed to the examination of the matter, and upon proof that an offence against this Act or any regulations made thereunder has been committed and that such goods were the subject matter, or were used in the commission, of such offence, shall order such goods or the proceeds of sale of such goods or the amount secured under paragraph 115(1)(a) or (b), as the case may be, to be forfeited, or in the absence of such proof, may order the release of such goods or the proceeds of sale of such goods or the security furnished under paragraph 115(1)(a) or (b), as the case may be.*
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- I**
- (e) s 135(1)(d) of the Customs Act 1967 which reads:
- 135 Penalty relating to smuggling offences, evasion of duty, fraud, etc.
- (1) Whoever —

(d) knowingly harbours, keeps, conceals, or is in possession of, or permits, suffers, causes or procures to be harboured, kept or concealed, any unaccustomed or prohibited goods;

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(f) item 13 of the Customs Duties (Exemption Order) 2017 which reads:

(i) That it has been registered by the authority responsible for registering or licensing motor vehicles in any foreign country;

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(ii) that it will be exported within three months of the date of import;

(iii) any other conditions as the Director General may deem fit to impose, provided that this exemption shall not apply to motor vehicles or motor cycles registered in Labuan or Langkawi and transported to the principal customs area.

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GROUNDS OF APPEAL

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[19] The plaintiff raised three main grounds of appeal which are briefly summarised as follows:

(a) the learned High Court judge had erred in law and/or in fact by relying on the bare denials of the first defendant;

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(b) the learned High Court judge failed to appreciate that the WhatsApp messages between the plaintiff's mother and the custom officer shall suffice as a written notice under s 128(1) of the Customs Act 1967; and

(c) the learned High Court judge had erred in law and/or in fact to appreciate the fact that the plaintiff's fundamental rights have been deprived by the defendants' conduct.

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PRINCIPLES OF LAW GOVERNING LEAVE APPLICATION

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[20] In *Country Garden Danga Bay Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor* [2019] MLJU 1295; [2020] 4 CLJ 865, speaking through Harmindar Singh Dhaliwal JCA (as he then was) held as follows:

[7] Applications for leave to appeal to the Court of Appeal are governed by s 68(1)(a) of the CJA 1964 which effectively states that no appeal shall be brought to the Court of Appeal when the amount or value of the subject-matter of the claim (exclusive of interest) is less than RM250,000, except with the leave of the Court of Appeal.

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[8] Where appeals are filed without leave having been obtained, and where leave is required, the court has no jurisdiction to hear the appeal (see *Harcharan Singh Sohan Singh v Ranjit Kaur S Gean Singh* [2011] 3 CLJ 593 ('Harcharan Singh')). The requirement for leave serves as a filter against frivolous or unmeritorious proceedings (*O'Reilly v Mackman* [1983] 2 AC 237). It must follow that no appeal can be filed against the decision of the Court of Appeal regarding leave as otherwise

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A the filter principle would be defeated (*Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 1 MLJ 129; [2000] 1 CLJ 1 ('Lam Kong'))

[21] In *Pang Hon Chin v Nahar Singh* [1986] 2 MLJ 145, Edgar Joseph Jr J (as he then was) held as follows:

B The circumstances in which leave to appeal will be granted would include cases where the applicant is able to demonstrate a prima facie case of error (see (1907) 123 LT Jo 202) or if the question is one of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to the public advantage.

C [22] This principle was further echoed in the Court of Appeal case of *United Oriental Assurance Sdn Bhd v Penang Medical Centre Sdn Bhd* [1999] 2 MLJ 542 wherein:

D The applicant, United Oriental Assurance Sdn Bhd, applied for leave to appeal to the Court of Appeal, under s 68(1) of the Courts of Judicature Act 1964. The High Court at Penang had held that applicant was generally liable to the respondent as insurer per se. The applicant is not satisfied with the whole decision and since the claim of the respondent is for less than RM250,000 ie RM120,288.40, leave to appeal to the Court of Appeal is therefore required.

E The applicant contended that leave to appeal should be given on the following grounds:

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- (i) it is a decision affecting a fundamental principle of law;
 - (ii) it is a decision of vital importance in the public interest;
 - (iii) there is a serious and important issue of law involved; and
 - (iv) there is a question of general principle upon where further argument and a decision of a higher tribunal will be of public advantage.

G The Court of Appeal speaking through Abu Mansor JCA (as he then was) held as follows:

H unless it can be shown the lower court had erred. In an application to the Court of Appeal where leave is sought, the matter is still dealt with by the principle enunciated in *Pang Hon Chin v Nahar Singh* [1986] 2 MLJ, where Edgar Joseph Jr J (as he then was) held that leave can only be given 'where the applicant is able to demonstrate a prima case of error.

I [23] Based upon the principles of law stated above and after a careful scrutiny of the notes of proceedings and the submissions made, we unanimously allowed the plaintiff's appeal. We now give our reasons.

[24] The fact that the plaintiff had breached the conditions prescribed under item 13 of the Customs Duties (Exemption) Orders 2017 and the seizure made in accordance to s 114 of the Customs Act 1967 due to expiry of the temporary

import permit (VMS) for the said vehicle on 3 November 2019 is undisputed.

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[25] Here, it is pertinent to emphasised that under s 128(1) of the Customs Act 1967 the seized goods' (vehicle) shall be taken and deemed to be forfeited at the expiration of one calendar month' from the date of seizure of the goods where there is no prosecution coupled with no claim whatsoever being made in respect of the goods within the one-month period.

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[26] However, if there was a notice of claim made in writing by the plaintiff under s 128(2) of the Customs Act 1967 within one calendar month from the date of seizure then it followed that no automatic forfeiture would follow. Then it becomes a requirement for the Customs Department to refer the seized goods to the first class magistrate.

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[27] Justice David Wong Dak Wah J (as he then was) in *Hock Huat Chan Sdn Bhd v Assan bin Mohammad & Ors* [2008] MLJU 92; [2008] 4 CLJ 512 held as follows:

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To recap, the Customs Act provides that when goods are seized and there is no prosecution the owner of the goods must make a written claim for the ownership within one calendar month from the date of the seizure. Failure to do so will result in the seized goods being forfeited. If a written claim is made, it is referred to a magistrate who will conduct a hearing to decide whether the seized goods are the subject matter of any customs offence.

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[28] In somewhat similar situation, the Court of Appeal in *Assan bin Mohamad & Ors v Hock Huat Chan Sdn Bhd* [2013] 5 MLJ 76 speaking through Mohd Hishamudin JCA (as he then was) held that:

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(1) There was no contravention of the Customs Act by the officers of the customs department with regard to the forfeiture of the goods. The respondent did not make any claim to the seized goods within the one-month period stipulated under ss 218 (1)(a) and (2) of the Act. In such a situation, the Act provided that the seized goods 'shall be taken and deemed to be forfeited at the expiration of one calendar month' from the date of seizure of the goods. There was nothing else for the customs department to do except to treat the goods as forfeited goods and to deal with them accordingly.

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[29] Hence, the question that arises for adjudication is whether the plaintiff (who claimed to be the owner of the vehicle) did, or did not make a claim under s 128(1)(b) read together with s 128(3) of the Customs Act 1967 before the expiry of one calendar month from the date of seizure?

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[30] Learned counsel for the defendants strongly contended there was no evidence adduced to prove that the plaintiff had indeed made a claim in writing to the seized vehicle within the one-month period stipulated. Even though the

A plaintiff claimed that she had issued the written notice to claim the said vehicle via letter dated 5 March 2020, documentary evidence adduced by the plaintiff in exhs 'L3' as attached in exh 'LPY1' in the applicant's affidavit in support clearly shows that the said letter was served/delivered on 15 September 2022.

B [31] Thus, this obviously shows that the said notice was only served on the first defendant on 15 September 2022 which is seven calendar months after the seizure notice was issued to the plaintiff. As such, it is submitted that the said seized vehicle shall be deemed to be forfeited in accordance with s 128(1) of the Customs Act 1967. In this instance, since the said vehicle is deemed to be
C forfeited, the plaintiff shall no longer have a valid claim for the said vehicle.

[32] Reliance is made on the Court of Appeal decision in the case of *Jabatan Kastam Diraja Malaysia & Ors v Apple International Co Ltd (Japan)* [2017] 3 MLJ 421 where the court through the judgment of Abdul Rahman Sebli (as he
D then was) held:

(4) The respondent's letter of 3 June 2013 was not a valid letter of claim under s 128(1)(a) or (b) of the Customs Act. It was not written within one calendar month from the issuance of the notice of seizure on 16 October 2006 and 3 October 2012 respectively. In fact, it was written more than one year after the issuance of the last
E of the notices of seizure.

[33] With greatest respect, we beg to differ. The plaintiff's affidavit in reply dated 14 December 2021 (exh 'LPY4') stated that on 24 February 2020 she
F and her mother met the Customs Officer namely, Mohd Alamin bin Mohamed at the Customs Office at Miri in relation to the seizure of the said vehicle. The plaintiff had also personally delivered a written application dated 5 March 2020 to the Customs Office at Miri within a month from the date of the seizure ie on 6 February 2020.

G [34] The plaintiff further said that Mohd Alamin bin Mohamed told her that the one-month time period under s 128 of the Customs Act 1967 was only a requirement on paper and 'not in effect' and that the customs would not be able to further proceed with her written application as they were waiting for the
H 'approval letter' from the court.

[35] The plaintiff also claimed that she had met Mohd Alamin bin Mohamed at the Customs Office at Miri for several times pertaining to her claim. The plaintiff was told by Mohd Alamin bin Mohamed that the Customs
I are still waiting for the approval letter and hence the delay in attending to the plaintiff application for release for the release of the said vehicle.

[36] These materials sworn statements in the plaintiff's affidavits were crucial to show that a written application was indeed made within the

stipulated time period and those statements were never disputed by the particular Customs Officer, Mohd Alamin bin Mohamed in any affidavits. The bare denials of the first defendant in respect of the plaintiff written application and visits to the Customs Office at Miri must certainly be ignored as the first respondent had no personal knowledge of the matters therein.

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[37] The defendant had, in their first defendant's affidavit in opposition (II) dated 25 January 2022 (exh 'LPY5'), averred only bare denial with no evidence to substantiate it or sufficiently rebut the plaintiff's averments in her affidavit. The lack of knowledge of the plaintiff's encounter and numerous meetings with the Customs Officer can never amount to a credible rebuttal to the plaintiff's applicant's averments on the series of events that happened in the Customs Office in Miri.

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[38] To our mind, the learned judge should have rejected such assertion or denial as it does not carry weight nor evidential value to give due consideration.

D

[39] Neither was there any disclaimed knowledge of the statements told by the said Customs Officer, Mohd Alamin bin Mohamed that the one-month time period under s 128 of the Customs Act 1967 was only a requirement on paper and 'not in effect' and that the customs would not be able to further proceed with the plaintiff written application as they were waiting for the 'approval letter' from the court. As such, the plaintiff's averments remain unchallenged.

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[40] In *Hong Leong Finance Bhd v Low Thiam Hoe & another appeal* [2016] 1 MLJ 301 at p 314; [2016] 3 MLRA 81 at 92 the Federal Court said:

[32] It is noted in the present case the defendant's affidavit in support failed to adduce an explanation for the delay in filing the said application. The Court of Appeal however held that the plaintiff should have filed an affidavit to oppose the application to amend which the plaintiff failed to do. With respect in our view the Court of Appeal erred on this point again. This is because the defendant's affidavit in support of its application to amend contained nothing more than a bare assertion. A bare assertion carries no evidential value and hence, there is nothing to reply ...

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[41] There is one last point which we should deal with and this arose from the WhatsApp messages between the Customs Officer, Sue and the plaintiff's mother namely Kho Yam Chue (exhs 'L6' and 'L7' of the applicant's affidavit in reply on 14 December 2021 in exh 'LPY4' of the plaintiff's affidavit in support).

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[42] To us, it is clear beyond doubt that the screenshot of WhatsApp conversation is reliable which relates to the plaintiff, the said vehicles and also

- A the defendants. This piece of evidence further strengthened the existence of a valid written claim for the temporary release of the said vehicle been made by the plaintiff within the time limit in pursuant to s 128(1) of the Customs Act 1967.
- B [43] This is also in tandem with the Court of Appeal's interpretation in *Mehdi Dadashi Havadaragh v Ketua Pengarah Jabatan Kastam Diraja Malaysia & Ors* [2015] 4 MLJ 646; [2016] 3 MLRA 657, where the court through the judgment of Nallini Pathmanathan JCA (as she then was) held as follows:
- C (3) An unnecessarily restrictive interpretation ought not to be accorded to the words 'give written notice' specified in s 128(2) of the Act. The words are not to be construed so narrowly as to confine the section to mean that it is only satisfied when the appellant issues a formal notice or letter in writing to the Customs Department within the requisite period of one month. The construction afforded by the High Court suggested that s 128(2) of the said Act meant that the appellant was required
- D to 'personally give or issue a written notice prepared by himself'. Such an interpretation did not accord with either a literal or purposive reading of s 128(2) of the Act and it adopted a hyper literal brand of construction or textualism. This was an interpretation that would severely narrow the scope and application of s 128(2) of the Act (paras 41 & 44).
- E (4) where words in a statutory provision have a plain and ordinary meaning, the court should not read additional words into the statute to curtail or narrow down the meaning of the words. The words 'give written notice' in s 128(2) are plain and clear. They do not require any elaborate interpretation. Neither should those words be unduly restricted. In the instant case, there was substantive compliance with
- F s 128(1)(a) and (2) of the Act. The Judge did not consider the effect of the contents of the statement procured by the Customs Officer on the very day of seizure, having erroneously concluded that the appellant had not procured the statement (paras 46-47).
- G (5) Since there was sufficient notice of a claim in writing by the appellant to the relevant Customs Officer, it followed that no automatic or 'deeming' forfeiture of the monies would follow. Automatic or 'deemed' forfeiture only occurred under s 128 of the Act where there is no prosecution and no claim made for the goods. At all material times when the appellant's application was filed in court, there was no prosecution and an effective claim within s 128(1)(a) of the said Act for the seized monies had been made (para 48).
- H (6) Section 128(1), (2) and (3) of the Act prescribed that where the Customs Department or the respondents are aware of a claim to the monies and they have failed to initiate a prosecution within one calendar month, there could be no forfeiture or deemed forfeiture. The respondents, through the Director-General of Customs, had to release or refer the claim to court (para 51).
- I (7) There was a failure to comply with s 128(3) on the erroneous conclusion that there was no 'claim' made by the appellant within the purview of s 128(1). The consequence was that the appellant was denied an opportunity of being unable to determine whether or not to initiate a prosecution or charge the appellant for more than one year and ten months, on what appeared to be a relatively straightforward

matter. This too, notwithstanding that they took statements corroborating the appellant's version of events from two other persons (para 52).

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[44] Be that as it may, the defendants argued that the facts in the *Mehdi* case are distinguishable from the present case here. In that case, there is evidence to show that a written statement was recorded from the appellant immediately after the seizure by the same senior customs officer who had seized the goods. However, in the instant case, there was no evidence adduced to show any recorded statement that was taken from the applicant to show such a claim was made.

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[45] With respect, we are constrained to say that these argument does not hold enough weight to overcome our evaluation of all the evidence in totality, the undisputed contemporary documents and the other affidavit evidence supporting the plaintiff case.

D

CONCLUSION

[46] We had perused all the cause papers and had considered the submissions of parties. With the overriding principles in mind as stated in the above, we have reached our unanimous decision.

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[47] In all these circumstances, it is evident that there was sufficient notice of claim as envisaged under ss 128(1)(b) and 128(3) of the Customs Act 1967 before the expiry of one calendar month from the date of seizure.

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[48] With respect, the learned trial judge had fallen into error in his findings by attaching undue weight on the defendants denials of the delivery of exh 'L3' in March 2020 and by heavily relying on the acknowledged receipt dated 15 September 2020 without giving due appreciation to the overwhelming documentary evidences led by the plaintiff, warranting appellate intervention.

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[49] We unanimously make the following order:

- (a) the application for leave to appeal to the Court of Appeal against the whole of the decision of the Miri High Court given on the 17 April 2023 which had dismissed the plaintiff's originating summons application under encl 1 dated 20 October 2021 is hereby granted;
- (b) that the plaintiff be given 30 days from the date of leave being given granted herein to file her notice of appeal to this honourable court against the decision of the Miri High Court given on the 17 April 2023; and
- (c) that the costs of this application be costs in the cause.

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A *Enclosure 1 allowed; court gave plaintiff 30 days from date of leave being granted to file notice of appeal; costs in cause.*

Reported by Dzulkarnain Ab Fatar

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